

United States District Court

For the Northern District of California

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5 IN THE UNITED STATES DISTRICT COURT

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7 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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9 SERVICE EMPLOYEES INTERNATIONAL UNION,
10 DAVID REGAN and ELISEO MEDINA, as trustees for
SEIU UNITED HEALTHCARE WORKERS-WEST
11 and fiduciaries of the SEIU UNITED HEALTHCARE
WORKERS-WEST AND JOINT EMPLOYER
EDUCATION FUND, SEIU UNITED HEALTHCARE
12 WORKERS-WEST, an unincorporated association and
fiduciary of the SEIU UNITED HEALTHCARE
WORKERS-WEST AND JOINT EMPLOYER
EDUCATION FUND, and REBECCA COLLINS, as a
13 participant in the SEIU UNITED HEALTHCARE
WORKERS-WEST AND JOINT EMPLOYER
EDUCATION FUND,

No. C 09-00404 WHA

14 Plaintiffs,

15 v.

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**ORDER GRANTING
IN PART AND
DENYING IN
PART MOTIONS
TO DISMISS**

25 SAL ROSELLI, JORGE RODRIGUEZ, JOAN EMSLIE,
JOHN BORSOS, JOHN VELLARDITA, GABE
KRISTAL, PAUL KUMAR, MARTHA FIGUEROA,
BARBARA LEWIS, PHYLLIS WILLETT, DANIEL
MARTIN, LAURA KURRE, RALPH CORNEJO, WILL
CLAYTON, GLENN GOLDSTEIN, FRED SEAVER,
MARK KIPFER, AARON BRICKMAN, IAN SELDEN,
GAIL BUHLER, FREJA NELSON, ANDREW REID,
NATIONAL UNION OF HEALTHCARE WORKERS;
MARYRUTH GROSS, CONNIE WILSON, ARLENE
PEASNALL, CHERIE KUNOLD, FAYE LINCOLN,
and DOES 1 through 100, inclusive,

26 Defendants.

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INTRODUCTION

This action is a small theater of a larger war between two rival healthcare unions vying
for the hearts and minds of the rank and file. The larger contest is legitimate on both sides.

1 The smaller theater — this lawsuit — is directed at specific wrongs allegedly done by former
2 officers of the old union before they bolted to organize the new union. While adjusting the
3 rights of the litigants in this litigation, the Court must be careful to prevent either side from
4 exploiting this action to handicap the other in the larger contest. Defendant Borsos moves to
5 dismiss claim one and claims three through six. Defendants NUHW, Rosselli, Kumar and
6 Figueroa move to dismiss claim seven. The TRO issued earlier lays out the basic fact pattern,
7 so this order will proceed directly to the analysis of the motions to dismiss.

8 ANALYSIS

9 On these motions to dismiss, the threshold question is subject-matter jurisdiction.
10 This order holds that subject-matter jurisdiction has been adequately pled, for the following
11 reasons.

12 1. SUBJECT-MATTER JURISDICTION.

13 Section 501(a) of the LMRDA expressly imposes fiduciary duties on the “officers,
14 agents, shop stewards, and other representatives of a labor organization” in relation to the
15 union and its members. It lists a half-dozen specific statutory fiduciary duties owed to the
16 union and its members. Section 501(b) expressly allows a union *member* to sue in federal
17 court — *on behalf of the union* — to enforce these duties, if the union itself refuses to do so,
18 subject to obtaining leave of court to sue derivatively on behalf of the union.

19 It is worthwhile to lay out the words. Section 501, entitled “Fiduciary responsibility
20 of officers of labor organizations,” includes the following:

21 (a) Duties of officers; exculpatory provisions and resolutions 22 void.

23 The officers, agents, shop stewards, and other representatives of a
24 labor organization occupy positions of trust in relation to such
25 organization and its members as a group. It is, therefore, the duty
26 of each such person, taking into account the specific problems and
27 functions of a labor organization, to hold its money and property
28 solely for the benefit of the organization and its members and to
manage, invest, and expend the same in accordance with its
constitution and bylaws and any resolutions of the governing
bodies adopted thereunder, to refrain from dealing with such
organization as an adverse party or in behalf of an adverse party in
any matter connected with his duties and from holding or acquiring
any pecuniary or personal interest which conflicts with the
interests of such organization, and to account to the organization

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for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) Violation of duties; action by member after refusal or failure by labor organization to commence proceedings; jurisdiction; leave of court; counsel fees and expenses.

When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte.

It is true that Section 501(b) does not also say that labor unions themselves can sue for their own account — but that is already manifestly implied in Section 501(a). It would be topsy-turvy to create a federal fiduciary duty in favor of unions yet *not* create a federal right of action by unions to vindicate it. It would be even more topsy-turvy to allow derivative actions on behalf of unions but *not* to allow direct actions by unions themselves.

The classic case before the McClellan Committee was the union boss who looted the treasury. Congress plainly meant for the union itself, once under new leadership, to be able to sue the ex-boss to recover the money. Indeed, Subsection (b) expressly contemplated the “governing board” of the union will have had its own opportunity to “sue,” before providing that a *member* might sue derivatively on behalf of the union. It is very hard to see how Congress would have made the member’s right of action turn on whether the union itself had already sued unless Congress meant for the union to have the right to sue as well. That unions were omitted from (b) was only because Congress thought they were already covered in (a). Subsection (b) was used to *expand* the ways in which the fiduciary duties would be vindicated,

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1 not to *reduce* them. Although the Supreme Court and the Ninth Circuit have not ruled on the
2 precise point, this order adopts the reasoning of the Seventh Circuit and Eleventh Circuit in
3 holding that Section 501(a) implies a federal right of action in favor of labor unions to enforce
4 the duties established therein. *Int'l Union of Operating Eng'rs, Local 150 v. Ward*, ____ F.3d
5 ____, 2009 WL 1011188 (7th Cir. Apr. 16, 2009). *Int'l Union of Electronic Workers v. Statham*,
6 97 F.3d 1416, 1421 (11th Cir. 1996).

7 In holding that Section 501(b) is limited to suits by union members and that unions
8 themselves cannot sue under Section 501(b), *Building Materials & Dump Truck Drivers Local*
9 *420 v. Traweek*, 867 F.2d 500, 506–07 (9th Cir. 1989), did not consider whether Section 501(a)
10 implies a right of action by unions. The actual holding of *Traweek* expressly pertained only to
11 Section 501(b) and *not* to Section 501(a). *Id.* at 507 (col. one). Moreover, *Traweek* involved a
12 union suit against a mere *member* (for unpaid dues). Section 501(a), however, contemplates
13 suits against “officers, agents, shop stewards and other representatives of a labor organization,”
14 not against mere members. The present suit is aimed at “officers, agents, shop stewards and
15 other representatives.” It is not aimed at mere members. *Traweek* had no occasion to consider
16 the fact pattern here at issue.

17 Here, it is alleged that defendants were officers, agents and other representatives of
18 UHW and that they stabbed the UHW in the back by trashing or allowing others to trash the
19 records and property of the union, all the while planning to launch a competing union, the
20 NUHA. Subject to proof, this plainly is actionable under Section 501(a) by the union and
21 therefore this suit is anchored in federal-question jurisdiction. 28 U.S. 1331.

22 To sustain subject-matter jurisdiction, therefore, it is unnecessary to reach or rely on
23 Section 301(a). Nonetheless, as stated earlier, this order repeats that for injunctive relief,
24 Section 301(a) would confer subject-matter jurisdiction as well. Section 301(a) of the LMRA,
25 29 U.S.C.A. 185(a) states, that “[suits for violation of contracts between an employer and a labor
26 organization . . . or between any such labor organizations, may be brought in any district court
27 of the United States” This language has been narrowed by the Supreme Court to exclude
28 damage actions by employers against individual union members and officers for violating a

1 no-strike provision in a collective bargaining agreement, *Complete Auto Transit, Inc. v. Reis*,
2 451 U.S. 401 (1981), leaving in place damage and injunctive suits against a union itself. The last
3 few sentences of the last footnote of the opinion for the Court, in acknowledging that an
4 injunction against the union would lie, expressly stated that an injunction against the individual
5 union members *might* also lie, subject to the anti-injunction rules under the Norris-LaGuardia
6 Act, 29 U.S.C. 104. (None of these rules would bar an injunction here.) At a minimum, *Reis*
7 left the question open whether an injunction against officers and members would be allowed.
8 In an earlier order herein, the undersigned ruled that an injunction against the former officers
9 may be the only effective remedy, as seems to be the case on the facts alleged and, therefore,
10 held that such a limited Section 301 suit would lie. Put differently, this is a case against a labor
11 organization (the NUHA) and the individuals are necessary as relief defendants.

12 **2. THE TRADE SECRETS CLAIM.**

13 With respect to the California trade-secret claim, defendants invoke preemption under
14 the National Labor Relations Act. The state-law claim alleges that defendants violated Civil
15 Code Section 3426 by misappropriating membership lists and other similar information
16 allegedly constituting “trade secrets” within the meaning of that provision.

17 Defendants contend that the claim is preempted under *San Diego Building Trades*
18 *Council v. Garmon*, 359 U.S. 263 (1959). As the Ninth Circuit recently explained:

19 In *Garmon*, the Court held that states may not regulate activity
20 that is actually or arguably protected or prohibited by the NLRA:
21 “When it is clear or may fairly be assumed that the activities
22 which a State purports to regulate are protected by § 7 of the
[NLRA], or constitute an unfair labor practice under § 8, due
regard for the federal enactment requires that state jurisdiction
must yield”

23 *Adkins v. Mireles*, 526 F.3d 531, 538–39 (9th Cir. 2008). An action is not preempted, however,
24 where “the activity regulated was a merely peripheral concern” of the Act. See, e.g., *Vaca v.*
25 *Sipes*, 386 U.S. 171, 179–80 (1969).

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1 Defendants' theory is that the conduct targeted by the claim is arguably "protected" by
 2 Section 7, which provides:

3 Employees shall have the right to self-organization, to form, join,
 4 or assist labor organizations, to bargain collectively through
 5 representatives of their own choosing, and to engage in other
 6 concerted activities for the purpose of collective bargaining
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29 U.S.C. 157.

This order need not reach this *Garmon* issue, for it holds that the union membership lists
 cannot qualify as a trade secret in the first place. "Trade secrets" are defined as:

information, including a formula, pattern, compilation, program,
 device, method, technique, or process, that:

- (1) Derives independent economic value, actual or potential, from
 not being generally known to the public or to other persons who
 can obtain economic value from its disclosure or use; and
- (2) Is the subject of efforts that are reasonable under the
 circumstances to maintain its secrecy.

Cal. Civ. Code § 3426.1(d).

The complaint alleges that UHW's "trade secrets" included "lists and other information
 and data identifying its members and their contact information (including but not limited to their
 addresses, telephone numbers, and e-mail addresses)" (Compl. ¶ 116).

Plaintiffs point to decisions regarding customer lists. Generally,

courts are reluctant to protect customer lists to the extent they
 embody information which is "readily ascertainable" through
 public sources, such as business directories . . . On the other
 hand, where the employer has expended time and effort identifying
 customers with particular needs or characteristics, courts will
 prohibit former employees from using this information to capture a
 share of the market. *Such lists are to be distinguished from mere
 identities and locations of customers where anyone could easily
 identify the entities as potential customers.*

Morlife Inc. v. Perry, 56 Cal. App. 4th 1514, 1521–22 (1997) (emphasis added). It is true that
 whether or not information is "readily ascertainable" is not part of the "trade secret" definition
 and has been found instead to constitute "a defense . . . based upon the absence of
 misappropriation." *Imax Corp. v. Cinema Technologies*, 152 F.3d 1161, 1168 n.10 (9th Cir.
 1998). Nevertheless, the allegations must plausibly allege that the purported "trade secret" is not
 "generally known" in the industry. Cal. Civ. Code § 3426.1(d)(1).

1 In the *business* context, if the clients or customers are known in the industry, a list of
2 them will not be deemed trade secrets. Similarly, it is implausible, at least under the
3 circumstances here presented, that plaintiff's bare list of members and their contact information
4 could be a trade secret. Union membership is drawn from a discrete and commonly known pool
5 of employees. *See Morlife Inc.*, 56 Cal. App. 4th at 1521–22; *Hilderman v. Enea TekSci, Inc.*,
6 551 F. Supp. 2d 1183, 1200–02 (S.D. Cal. 2008). A list of union members has never been held
7 to be a trade secret.

8 The analogy to business customers is false. A list of union members is different from a
9 customer list. Customers buy from the same seller and have nothing else in common. They do
10 not know about each other. The public usually does not know who buys what. By contrast,
11 union members have much in common. They stand shoulder to shoulder. That is the whole
12 point of a union. The union represents all of them. All of them combine in common cause.
13 They attend the same meetings and engage in the same concerted activities. They know their
14 fellow members. Moreover, the bargaining unit definition is public. Exactly who within the
15 unit is a card-carrying member of the certified representative is not much of a secret.

16 Yes, defendants must return the physical embodiments of any purloined lists (just as
17 they must return all physical property of plaintiffs), but defendants are free to use whatever
18 information they remember from those lists and their years of service with UHW.
19 That membership information was never a trade secret under California law.

20 **3. ALL OTHER CLAIMS.**

21 As for mootness, the undersigned knows enough about the case to know it is not entirely
22 moot. If the upcoming preliminary injunction hearing shows mootness, then, at least to that
23 extent, relief will be denied. As to the requirement for irreparable harm, such harm has been
24 adequately alleged and the undersigned will be careful, in awarding any injunctive relief, not to
25 violate *American Trucking Association, Inc. v. City of Los Angeles*, ____ F.3d ____, 2009
26 WL 723993 (9th Cir. Mar. ___, 2009).

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1 As to the argument that Defendant Borsos has legitimately withheld documents based
2 on attorney-client privilege, that issue is presumably before Magistrate Judge Maria-Elena James
3 and is premature here.

4 As to the other state law claims, the Court will retain supplemental jurisdiction over
5 them but this order declines to rule any of them in or out as a pleading matter with one exception
6 above (the trade-secrets claim). The federal Section 501(a) claims seems likely to drive this
7 action, and the state law claims seem like overkill.

8 The motions to dismiss are **DENIED** without prejudice to move again in some more
9 concrete context except as to the trade-secrets claim, as to which dismissal is **GRANTED**.
10 Although defendant Borsos moved to dismiss only on behalf of himself, numerous other
11 defendants filed motions to join the Borsos motion (Dkt. Nos. 121, 144, 148, 164). Leave to join
12 the Borsos motion is hereby **GRANTED** and the above-described rulings apply equally to each
13 defendant.

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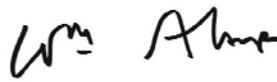
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IT IS SO ORDERED.

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17 Dated: May 14, 2009.

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WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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